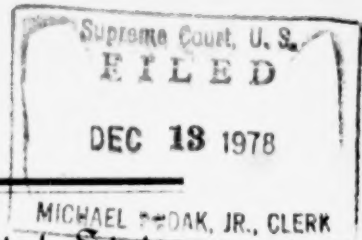


No. 78-653



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**In the Supreme Court of the United States**

OCTOBER TERM, 1978

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PATRICIA H. BRENNAN AND J. PAUL BREENAN, d/b/a  
P.H. BRENNAN HAND DELIVERY, PETITIONERS

v.

UNITED STATES POSTAL SERVICE

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*ON PETITION FOR A WRIT OF CERTIORARI TO  
THE UNITED STATES COURT OF APPEALS FOR  
THE SECOND CIRCUIT*

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**MEMORANDUM FOR THE RESPONDENT  
IN OPPOSITION**

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WADE H. MCCREE, JR.  
*Solicitor General  
Department of Justice  
Washington, D.C. 20530*

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1. Petitioners operated a private mail delivery service in downtown Rochester, New York. Their service allowed customers, primarily law firms and businesses, to send letters within Rochester for 10 cents apiece, as opposed to the 15 cents charged for first-class letters delivered by the United States Postal Service. Petitioners concede that their delivery service violates the Private Express Statutes, which proscribe the private carriage and delivery of letters. 39 U.S.C. 601-606; 18 U.S.C. 1693-1699.

The Postal Service filed suit against petitioners, seeking an injunction barring them from carrying letter mail. Petitioners argued that the Private Express Statutes exceed the powers granted to Congress in Article I, Section 8 of the Constitution by conferring a monopoly on letter delivery on the Postal Service.

The district court rejected this argument and enjoined petitioners from carrying any "letters," as that term is defined in 39 C.F.R. 310.1(a).<sup>1</sup>

The court of appeals affirmed and refused to stay the injunction pending disposition of the petition for a writ of certiorari by this Court (Pet. App. A-1 to A-13). The mandate issued from the court of appeals on July 28, 1978, and petitioners then ceased operations. Petitioners applied to this Court for a stay on August 4, 1978. Mr. Justice Marshall denied the application on August 11, 1978 (Pet. App. A-21 to A-23).<sup>2</sup>

2. The decision of the court of appeals is correct and does not conflict with any decision of this or any other court.

The postal monopoly of the United States Government is as old as the Nation itself. The First Congress enacted legislation to continue the postal monopoly established by the Continental Congress. Act of February 20, 1792, ch. 7, 1 Stat. 235-236, adopting Act of October 18, 1782, 23

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<sup>1</sup>The applicable regulations exclude a number of items from the definition of "letters," including financial instruments transmitted between financial institutions, 39 C.F.R. 310.1(a) (7)(ii), abstracts of title, mortgages, deeds, leases, articles of incorporation, papers filed in lawsuits, orders of courts, 39 C.F.R. 310.1(a)(7)(iii), newspapers and periodicals, 39 C.F.R. 310.1(a)(7)(iv), and books and catalogs, 39 C.F.R. 310.1(a) (7)(v). Petitioners, in an earlier application to this Court for a stay pending appeal, represented that "[m]uch, if not most of the mail which is carried is not 'letter mail' as that term is defined at 39 C.F.R. 310.1(a)(7), but is in the nature of exempt business transaction mail, abstracts of title, mortgages, and papers filed in lawsuits" (Stay App. 2). The injunction does not affect these items.

<sup>2</sup>Mr. Justice Marshall's opinion analyzed petitioners' principal legal argument and concluded that its premise is "tenuous" (Pet. App. A-22).

Journals of the Continental Congress 672-673 (1782). No court has ever doubted the constitutionality of this legislation, which has been upheld on at least four occasions. See Pet. App. A-6 to A-7, citing, e.g., *United States v. Black*, 569 F. 2d 1111 (10th Cir.), cert. denied, 435 U.S. 944 (1978). We rely on the thorough discussion and analysis of the court of appeals.<sup>3</sup>

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.  
*Solicitor General*

DECEMBER 1978

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<sup>3</sup>Petitioners also argue (Pet. 17-23) that the Postal Service's implementing regulations (see note 1, *supra*) deny them equal protection and violate the separation of powers doctrine. The Second Circuit correctly held, however, that the regulations do not create an invidious classification because "the classification is not directed against persons; rather it is based upon types of mail" (Pet. App. A-11). Moreover, the distinctions made are wholly rational. The court of appeals also correctly rejected petitioners' assertion that the regulations are the result of an improper delegation of congressional authority to an executive agency (Pet. App. A-9).